

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY OSBORNE

Claimant

VS.

GEC WELCO DIVISION

Respondent

AND

ZURICH INSURANCE COMPANY

Insurance Carrier

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Docket No. 220,572

ORDER

Respondent requested review of Administrative Law Judge Jon L. Frobish's September 4, 1998, Award. Oral argument was held in Wichita, Kansas, on March 12, 1999.

APPEARANCES

Terry L. Pullman of Wichita, Kansas, appeared for the claimant. Stephen J. Jones of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant, on May 9, 1996, suffered a right ankle injury while working for the respondent. Thereafter, as a result of an altered gait caused by the work-related right ankle injury, claimant sustained a permanent injury to his back. Respondent was not able to accommodate claimant's permanent work restrictions resulting from those injuries. At the close of the evidentiary record, claimant was unemployed, and the Administrative Law Judge awarded claimant a permanent partial general disability of 91.65 percent based on a work disability.

The respondent appealed and contends that claimant failed to prove he suffered a permanent back injury as a result of an altered gait caused by his work-related right ankle injury. Accordingly, the respondent contends claimant is not entitled to a work disability award. Respondent argues claimant is limited to permanent partial disability benefits based on a 9 percent functional impairment of the right lower extremity as set forth in the schedule found at K.S.A. 1996 Supp. 44-510d(a)(16).

Conversely, claimant requests the Appeals Board affirm the Administrative Law Judge's work disability award. Furthermore, claimant contends the respondent has filed a frivolous appeal and requests the Appeals Board, as provided for in K.S.A. 44-536a, to award in favor of the claimant and against the respondent reasonable attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The respondent had claimant examined and evaluated by Philip R. Mills, M.D., board certified in physical medicine, electroneurodiagnosis, and pain management. Dr. Mills saw claimant on three separate occasions, November 20, 1997, July 1, 1998, and July 29, 1998. Dr. Mills testified by deposition on two occasions, May 27, 1998, and August 21, 1998.

Dr. Mills set out his findings in regard to his first examination of claimant in a comprehensive report to respondent's attorney dated November 20, 1997. That report was admitted into evidence during Dr. Mills' May 27, 1998, deposition. Dr. Mills reviewed claimant's medical treatment records, took a history from the claimant, and performed a physical examination of claimant. The doctor's diagnosis was probable reflex sympathetic dystrophy of the right ankle with a back sprain. He found claimant ambulated with an antalgic limp on the right. Dr. Mills further concluded that claimant's back sprain more likely was secondary to his altered gait pattern.

But before Dr. Mills' deposition testimony was taken on May 27, 1998, respondent had claimant video taped for a three-day period in April of 1998 by a private investigator. That video tape was then reviewed by Dr. Mills before his deposition testimony. Dr. Mills testified that he had observed the claimant on the video tape and concluded he could not now give an opinion within reasonable medical probability that claimant's back problem was causally related to his altered gait. On cross examination, however, the doctor testified he could not give an opinion within reasonable medical probability that claimant's back problem was not related his altered gait.

Pedro A. Murati, M.D., board certified in rehabilitation and physical medicine treated claimant for his ankle and back injuries and testified in this case. He first saw claimant on March 11, 1997. Following conservative treatment, he found claimant had met maximum

medical improvement and released claimant from treatment on June 3, 1997. Dr. Murati's diagnosis was also reflex sympathetic dystrophy of the right ankle and lumbosacral strain secondary to antalgic gait. He placed permanent restrictions on claimant in accordance with a functional capacity evaluation performed on May 30, 1997.

Dr. Murati also reviewed the video tape of claimant's activities that took place for three days in April of 1998. After reviewing the video tape, Dr. Murati examined claimant again on June 25, 1998. He found claimant's condition had not changed from when he treated claimant over a year ago in 1997. The doctor also opined that claimant's antalgic gait was the result of claimant's right ankle injury which further caused claimant's lumbosacral strain.

The substance of the respondent's argument questions whether claimant suffered a scheduled injury or a whole body injury based on whether Dr. Mills' medical opinion is more credible than Dr. Murati's. Respondent contends claimant has failed to prove that his altered gait caused his back strain because Dr. Mills, after reviewing the video tape, cannot now express an opinion within reasonable medical probability that the altered gait caused claimant's back sprain. On that basis, respondent argues that claimant failed to prove his back strain was a natural and probable consequence of his work-related right ankle injury.

In addition to the opinion of Dr. Murati, claimant also established through his testimony that, after his right ankle injury, his back became symptomatic as the result of that injury causing him to walk with an altered gait. The Appeals Board concludes that claimant's testimony coupled with the definitive opinion of his treating physician, Dr. Murati, has proven claimant's back strain was a natural and probable consequence of his work-related right ankle injury. When a primary injury under the Workers Compensation Act is shown to have arisen out of and in the course of the employment, every natural consequence that flows or results from the injury, including any new and distinct injury, is compensable. See Jackson v. Stevens Well Service, 208 Kan. 637, Syl. ¶1 493 P.2d 264 (1972).

Therefore, the Appeals Board affirms the award and adopts as its own the findings and conclusions contained in the award as if specifically set forth herein.

The Appeals Board denies claimant's request for an award of attorney fees against the respondent and in favor of the claimant for an alleged filing by the respondent of a frivolous appeal before the Appeals Board. The Appeals Board finds respondent had some basis in the record for its argument on appeal concerning the issue of whether claimant sustained a scheduled injury or whole body injury based on Dr. Mills changing his opinion from probable to possible that claimant's altered gait caused his back sprain.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's September 4, 1998, Award should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry L. Pullman, Wichita, KS
Stephen J. Jones, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director